Supreme Court, U.S.
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No. 03 – 1707

In The

Supreme Court of the United States

RUSSELL ALLEN NORDYKE, *et al.*, Petitioners,

vs.

MARY V. KING, *et al.*, Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF RE: PETITION FOR A WRIT OF CERTIORARI*

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* The Conference in this matter is set for September 27, 2004.

QUESTIONS PRESENTED

1. Do individuals have standing to litigate any rights under the Second Amendment to the United States Constitution?

2. Can the individual rights guaranteed by the Second Amendment to the United States Constitution be enforced against infringements by state and local governments?

3. Does a county ordinance prohibiting the possession of firearms at gun shows held at a county fairgrounds, in contexts that involve core political, educational and social speech, abridge rights under the First Amendment to the United States Constitution?

STATEMENT PURSUANT TO RULES 14.1(b) & 29.6

All parties are set forth in the caption.

T S TRADE SHOWS is the business name used by RUSSELL and SALLIE NORDYKE to conduct business as gun show promoters throughout Northern and Central California. The business is wholly owned by the Nordykes.

Petitioner VIRGIL McVICKER is president of the MADISON SOCIETY, a Nevada Corporation with its registered place of business in Carson City, Nevada. The Madison Society has chapters throughout California. The society is a membership organization whose purpose is preserving and protecting the legal and constitutional right to keep and bear arms for its members and all responsible law-abiding citizens. It is not a publicly traded corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully submit this Reply Brief in support of their Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

PROCEDURAL ISSUES RAISED BY RESPONDENTS' BRIEF IN OPPOSITION

At least part of Respondents' arguments appear to have become infected with the same childish style now used by political candidates during this political season, otherwise known as the "liar, liar, pants on fire" argument.

Respondents complain in footnote 1 of their Brief In Opposition that Petitioners are attempting to engage in skullduggery by attempting to "bootstrap" facts into the appellate record. This same complaint was raised in both the Ninth Circuit and the California Supreme Court when Respondents filed motions to strike portions of Petitioners' Excerpt of Record based upon the same theories. The Respondents admit that neither court ruled on those motions.

Instead of accepting the legally operative fact that motions not ruled upon in a timely fashion are deemed denied, Respondents choose instead to impugn the integrity of Petitioners' counsel.

The mudslinging continues when Respondents accuse Petitioners of making misstatements of fact in our Petition. [See Respondents' Brief, pg. 1]

This would indeed be a serious charge were it true. However, a careful reading of the Petition's statement of facts along side Judge O'Scannlain's statement of facts from the OPINION AND ORDER OF UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AFFIRMING DISTRICT COURT'S ORDER DENYING PLAINTIFFS'

MOTION FOR INJUNCTIVE RELIEF [Pet. App. 1] will reveal that Petitioners' counsel "borrowed" liberally most of the exact language in its statement of facts from that opinion.

Respondents cannot (and did not) cite to any statement of fact contained in the Petition that is was not also set forth in any of the various opinions of the Courts that have heard this matter.

Nor does a fair reading of the opinions below reveal that those judges were misled into believing that the Ordinance applied throughout Alameda County, instead of just on county property, as was argued in Respondents' footnote 3.

The dissenting opinion in the ORDER DENYING REHEARING EN BANC: UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT [Pet. App. 22, 26] clearly states:

> [A]ppellants in Nordyke challenged a local ordinance prohibiting the possession of all firearms on county property, which had the effect of foreclosing a traditional gun show.

An additional challenge to Petitioners' veracity is made in Respondents' footnote 12, which implies that Petitioners' counsel misled this Court by suggesting that the Ninth Circuit Panel in this case *sua sponte* called for briefing the Second Amendment issues.

The quote referred to in footnote 12 (from page 5) of the Petition is read out of context. At the top of page 4 of the Petition, it is clearly stated that: "Nordykes sought permission to brief Second Amendment issues."

Perhaps if the Respondents had stuck to the law of the case as authored by the various judges in this case, they would not have violated Rule 14.1(a) by raising new questions not set forth in the Questions Presented for this Court's consideration in the Petition.

SUBSTANTIVE ISSUES RAISED BY RESPONDENTS' BRIEF IN OPPOSITION

The fact that: "Judges O'Scannlain and Gould voted to grant the petition for rehearing en banc, and Judge Alarcon so recommended." [Pet. App. 22] already speaks volumes. Only a request for certification under Rule 19 could have been a stronger endorsement of the issues presented by the Petitioners in their request for a Writ of Certiorari.

Since Respondents did Petitioners the favor of including our PETITION FOR REHEARING *EN BANC* AND PANEL REHEARING in their appendix [See Resp. App. 34], Petitioners are reluctant to burden this Court with any more substantive arguments in this reply that are not already contained in that document. This very brief reply will address the only new issue raised by Respondents' Brief in Opposition.

It is irrelevant that Petitioner/Plaintiffs did not plead a Second Amendment cause of action in their verified complaint.

Petitioners have never hidden the fact that no specific Second Amendment cause of action was set forth in their verified complaint. But claims can be implied from the facts which are alleged. It is not always necessary to specify the precise nature of the claim asserted as long as the facts alleged put defendant on notice thereof. [See: *Self Directed Placement Corp. v. Control Data Corp.* (9th Cir. 1990) 908 F.2d 462, 466]

There is also the fact that the District Court Judge [Jenkins] raised the Second Amendment standing issue *sua sponte* in his order denying injunctive relief. [Pet. App. 62, 63].

Nor does it help that the Second Amendment standing issues were not argued to the Ninth Circuit until late in the litigation. District court standing may be addressed *sua sponte* at any time by an appellate court. [See: *FW/PBS, Inc. v. City of*

Dallas, 493 U.S. 215, 230-231, 110 S.Ct. 596, 607-608 (1990); *Washington Legal Found. v. Legal Found. of Washington*, 271 F.3d 835, 847 (9th Cir. 2001); and *B.C. v. Plumas Unified School Dist.*, 192 F.3d 1260, 1264 (9th Cir. 1999) -- "federal courts are required *sua sponte* to examine jurisdictional issues such as standing"]

Therefore the only real issue raised with respect to whether the Second Amendment standing issues are properly before this Court are the "irreducible minimum standing" requirements as set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S.Ct. 2130, 2136 (1992) and *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-181, 120 S.Ct. 693, 704 (2000).

Petitioner must have suffered an injury in fact as a result of the district court's decision -- an invasion of a legally protected interest that is (i) concrete and particularized, and (ii) actual or imminent, not conjectural or hypothetical. In this case Judge O'Scannlain's opinion [Pet. App. 2] found that:

> The Ordinance would forbid the presence of firearms at gun shows, such as Nordyke's, held at the Fairgrounds. As a practical matter, the Ordinance makes it unlikely that a gun show could profitably be held there.

Second, there must be a causal connection between the injury and the conduct complained of. Judge Kleinfeld [Pet. App. 24] wrote:

> In this case, by contrast, the result might well have been different if we had not erased the Second Amendment. The ordinance at issue, subject to narrow exceptions, criminalizes any and all possession of firearms on county property. The case before the panel was about apparently law-abiding persons wanting to hold a gun show at a fairgrounds.

Finally, there must be a likelihood of success, as opposed to mere speculation, that petitioner's injury will be redressed by a favorable decision. Judge Gould opined [Pet. App. 26]:

> [A]ppellants in Nordyke challenged a local ordinance prohibiting the possession of all firearms on county property, which had the effect of foreclosing a traditional gun show. Some may consider that the regulation of assault weapons may implicate too many difficult considerations beyond that of whether the Second Amendment confers an individual or collective right. The ordinance at issue in Nordyke, if it must be tested in light of an individual Second Amendment right, will not raise the same concerns. If the Second Amendment confers an individual right, then the Nordyke gun possession ban presents a better context in which our court might have assessed the constitutionally permissible bounds of gun regulation.

These are the standard Article III standing issues, however this case is about more than just the issue of justiciability. If "the people" set forth in the Second Amendment have no standing to assert claims under that Amendment, then this Court needs to give an explanation to the "the people" defined by the First, Fourth, Ninth and Tenth Amendments as to what differences exist between these two classes of persons.

The rest of Respondents' Brief in Opposition reads more like a brief on the merits. If they wish to make those arguments, this Court should oblige them and grant certiorari.

It bears emphasis that this case is on appeal from a request for pre-trial injunctive relief. It is apparent that at least the First Amendment claims must go on to be litigated in an "as applied"

challenge in the District Court[1]. Since that may necessitate further amendments to the pleading, Petitioners should be permitted to amend their claims to include a Second Amendment Cause of Action based upon legal principles arising out the Fifth Circuit in *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001) and the various concurring and dissenting opinions in *Silveira v. Lockyer*, 312 F.3d 1094 (9th Cir. 2002), *Nordyke v. King*, 319 F.3d 1185, (9th Cir. 2003) and *Nordyke v. King*, 364 F.3d 1025 (9th Cir. 2004).

Current Ninth Circuit law precludes individuals from invoking Second Amendment standing. Rather than requiring the Petitioners to go back and plead Second Amendment claims in a good faith attempt to challenge the Ninth Circuit's Second Amendment standing rules, this Court should settle the standing issue once and for all right here and now. Then as Judge Gould stated [Pet. App. 19]:

> We would make progress if the Supreme Court were to establish a doctrine of an individual Second Amendment right subject to reasonable government regulation. The decisional chips would thereafter fall where they may on the basis of particular cases and the delicate balance of their precise facts, aided by the complementary efforts of lawyers, scholars and judges. The law would best put aside extreme positions and adopt an assessment of reasonableness of gun regulation, for this would place us on the right track. [Footnotes omitted]

Only a grant of certiorari and an order permitting Petitioners to raise Second Amendment claims would permit this process to go forward.

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[1] Unless this Court summarily reverses on the First Amendment issue raised in the Petition.

CONCLUSION

Here are two passages from an infamous case in which this Court attempted to interpret what it means to be a citizen and/or person (alternate concepts of the term of art "the People") with standing to invoke the protections of the United States Constitution and its Amendments. [emphasis is added]

> It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, **and to keep and carry arms wherever they went**. And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State.

And:

> **Nor can Congress deny to the people the right to keep and bear arms**, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding.
>
> These powers, and others, in relation to rights of person, which it is not necessary here to

enumerate, are, in express and positive terms, denied to the Goneral [sic] Government; and the rights of private property have been guarded with equal care. Thus the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.

So, too, it will hardly be contended that Congress could by law quarter a soldier in a house in a Territory without the consent of the owner, in time of peace; nor in time of war, but in a manner prescribed by law. Nor could they by law forfeit the property of a citizen in a Territory who was convicted of treason, for a longer period than the life of the person convicted; nor take private property for public use without just compensation.

The powers over person and property of which we speak are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them. And this prohibition is not confined to the States, but the words are general, and extend to the whole territory over which the Constitution gives it power to legislate, including those portions of it remaining under Territorial Government, as well

> as that covered by States. It is a total absence of power everywhere within the dominion of the United States, and places the citizens of a Territory, so far as these rights are concerned, on the same footing with citizens of the States, and guards them as firmly and plainly against any inroads which the General Government might attempt, under the plea of implied or incidental powers. And if Congress itself cannot do this -- if it is beyond the powers conferred on the Federal Government -- it will be admitted, we presume, that it could not authorize a Territorial Government to exercise them. It could confer no power on any local Government, established by its authority, to violate the provisions of the Constitution.
>
> It seems, however, to be supposed, that there is a difference between property in a slave and other property, and that different rules may be applied to it in expounding the Constitution of the United States. And the laws and usages of nations, and the writing of eminent jurists upon the relation of master and slave and their mutual rights and duties, and the powers which Governments may exercise over it, have been dwelt upon in the argument.

The case, of course, is *Dred Scott v. Sanford*, 60 U.S. 393 (1856). These arguments were used to bolster the proposition that a black man who had been [still was?] a slave did not have standing to pursue a "due process of law" claim under the United States Constitution.

This Court in 1856 made a mistake that took a civil war and passage of the Fourteenth Amendment to rectify. That mistake came from an attempt to reify a concept which does not exist under current law:

> *The idea of a man born in this country who is neither citizen, person nor one of "the people" protected by our Constitution and its Amendments.*

The current law on Second Amendment standing in the Ninth Circuit[2] makes a corollary mistake. The rule creates a non-entity. It creates a class of "the people" who have a "right to keep and bear arms", who nevertheless have no standing to invoke that right.

Only this Court sitting in 2004/2005 can rectify that mistake by granting certiorari and issuing an order that individuals do have standing to raise and litigate rights under the Second Amendment to the United States Constitution.

Respectfully submitted,

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[2]And since the California State Constitution has no "right to keep and bear arms" in its state constitution, that means all the citizens of California.